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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 608.

SUSIE RANDOLPH,
Petitioner,

v.

GEORGE STOKES, Defendant,
EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a Corporation,
Garnishee, Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

JOHN S. MARSALEK,
330 Pierce Building,
112 North Fourth Street,
St. Louis 2, Missouri,
Counsel for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

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I.

Petitioner's complaint against the decision of the United States Court of Appeals is based upon the erroneous assumption that the removability of a garnishment proceeding is controlled by the characterization of a garnishment under Missouri law. This argument has been raised in this Court on a prior occasion and ruled adversely. In Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 104, 61 S.

Ct. 868, 870, 85 L. Ed. 1214, Mr. Justice Stone, speaking for a unanimous Court, said:

> "* * * But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in which instances suits are to be removed from the state to the federal courts: Cf. Burnet v. Harmel, 287 U. S. 103, 110, 77 L. Ed. 199, 204, 53 S. Ct. 74."

The opinion quoted *supra* is supported by a long line of decisions of this Court, including Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 328-329, 34 S. Ct. 333, 58 L. Ed. 621; Commissioners of Road Improvement Dist. v. St. Louis Southwestern Ry. Co., 257 U. S. 547, 557-558, 42 S. Ct. 250, 66 L. Ed. 364, and Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 27 S. Ct. 321, 51 L. Ed. 629, 633. And exactly the same holding is found in the more recent case of Chicago, R. I. & P. R. Co. v. Stude, 346 U. S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317, 326.

The rationale of the Shamrock case, supra, and the succeeding and supporting decisions is obvious. It is axiomatic that the Constitution and statutes of the United States should be finally applied and interpreted by the courts of the United States without a veto or overriding power in the legislative or judicial branches of the various states' governments. If the argument forwarded by petitioner were adopted, the states could limit at will the right of removal by exercising a legislative or judicial fiat. The

effect would be to allow the states to accomplish indirectly what they cannot do directly, Courtney v. Pradt, 196 U. S. 89, 25 S. Ct. 208, 49 L. Ed. 398. The garnishment proceeding involved in the instant case is an adversary proceeding between a judgment creditor on one side and an insurance company on the other, concerning coverage afforded the judgment debtor, who is not in fact a party to the garnishment proceeding. Since there is diversity of citizenship between the judgment creditor and the insurer, respondent is afforded the right to remove the proceeding in accordance with the provisions of 28 U. S. C. A. 1441.

If twenty-four states should technically denominate such similar proceedings as "ancillary" to the suit in which judgment was obtained, and twenty-five states should define it as an "independent action" shall the garnishees in twenty-four states be deprived of, and the remainder be invested with, the right to remove the garnishment? The issues in each such instance are the same; the nature of the proceeding does not differ essentially; the reasons requiring removal are as valid in each instance; the same basis exists for the constitutional and legislative policy permitting removal. We respectfully submit that it is not, and never has been, the intent of Congress to apply the removal provisions of the statutes in a crazy-quilt fashion determined solely by technical terminology in the opinions of the various state courts. This is not to deny the right of the state courts and legislatures to employ whatever language they desire in describing the relation between an action in which a judgment is obtained and a garnishment against a third party, a stranger to the record, to obtain satisfaction of that judgment. Whether the judicial choice of words in a given state be "ancillary" or "independent," "auxiliary" or "original," the descriptive words cannot change the essential nature of the proceeding.

The holding, logic and effect of the Shamrock opinion, cited and quoted supra, are embodied in Rule 64, Federal

Rules of Civil Procedure,[1] which in effect embodies in Federal civil procedure the code of the state in which the Court is sitting, with respect to garnishment, attachment, lis pendens, and other similar remedies, regardless of whether the particular action originates in the District Court or is removed from the state court, and regardless also of "whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Authority soundly based on reason and logic establishes the principle that interpretation of the removal statutes is by the United States courts, not governed by state law. The District Court must examine the substance of the garnishment procedure under state law, and then apply the law enacted by Congress.

II.

a. What then is the substance of garnishment procedure in Missouri, and in the instant case in particular? The garnishee is brought into court by service of process (Sections 525.020 and 521.170, Mo. Rev. Stats., 1949). The issues to be tried are determined wholly from pleadings filed respectively by the creditor and garnishee (Section

[1] At the commencement of and during the course of an action all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

525.190. Mo. Rev. Stats., 1949). No pleadings are required of or permitted by the judgment debtor, who is not a participant in the proceeding. Right to trial by jury is preserved, and either party may appeal from an adverse judgment (Section 525.190, Mo. Rev. Stats., 1949; Garre v. American Mut. Cas. Co., 20 S. W. 2d 540 [Mo. App.], Rainwater v. Wallace, 351 Mo. 1044, 174 S. W. 2d 835). If judgment is rendered against garnishee, it is an in personam judgment which may be enforced by general execution against his assets (Section 525.110, Mo. Rev. Stats., 1949). Procedurally, practically and effectively, the instant action is nothing more than a suit by plaintiff, as an alleged third-party beneficiary, on an insurance policy issued by garnishee to the judgment debtor. The proceeding in no manner differs from a direct action on the policy (for example, under a "medical benefit" provision). It is in no wise different than a trial on a policy of life insurance, health and accident insurance, etc., except for the appellation "garnishment" and the designation of the pleadings as "answer" and "denial", rather than "petition" and "answer." These superficial variations cannot cloak or hide the essential nature of the proceeding.

The Missouri decisions, even if they were determinative, do not indicate that garnishments are considered "ancillary" uniformly and for all purposes. Language indicates that for some purposes the Missouri appellate courts consider garnishments as independent actions. In Wilson v. St. Louis-San Francisco Ry. Co., 108 Mo. 588, 18 S. W. 986, the facts were that Mr. Wilson had obtained judgment against another railroad in a prior suit, and an execution was returned nulla bona as to corporate property of the judgment debtor in that prior suit. Under a statutory procedure, Wilson had an execution issued against certain non-resident stockholders of the debtor railroad, and levied upon certain locally-available stock which they owned in the St. Louis-San Francisco Railway Company. The opin-

ion cited, 108 Mo. 588, is a suit wherein Wilson sought to compel the St. Louis-San Francisco Railway Company to transfer upon its books the stock upon which he had levied. Wilson contended that the non-resident stockholders were in effect parties to the original action, hence in effect judgment debtors. In passing upon that contention, the Supreme Court of Missouri said (l. c. 108 Mo. 601):

> "Accepting these authorities as the correct guide, any proceeding against the stockholders subsequent to the judgment against the corporation must be regarded as an **original and independent proceeding, as much so as is garnishment process against a mere stranger to the record.**" (Emphasis ours.)

Thus it is clear that the blind application of such terms as "dependent", "ancillary", "auxiliary" from Missouri cases only confuses the fundamental issue. In some contexts and in some frames of reference a garnishment in aid of execution may be "ancillary." For example, it is self-evident that a garnishment in aid of execution must come after and follow, legally and chronologically, some action in which a judgment has been obtained. If there were no judgment, there would be no garnishment in aid of execution. But as between the judgment creditor and the garnishee, the action is an original and independent proceeding. Especially as to the garnishee (the defendant party, the removing party, a stranger to the prior suit), the garnishment action original and independent—and we respectfully state that it is the right and interest of the defending and removing party which the Congress has sought to protect by adopting the removal statutes. Certainly as to that defending and removing party, the action is original, and not derivative.

Petitioner cites and quotes at length from Brucker v. Georgia Casualty Company, 14 F. (2) 688 (E. D. Mo.), in which case the District Court pondered the problem as to

how the garnishee could, in the District Court, avail itself of the option under Section 525.070, Revised Statutes of Missouri, 1949, of discharging all liability before judgment on the garnishment by making payment to the state sheriff of the amount admittedly due. This problem, if it ever really existed, was resolved by Rule 64, Federal Rules of Civil Procedure, adopted subsequent to the Brucker decision. That rule in effect adopts by reference the Missouri law pertaining to garnishment and attachment (as to Federal courts sitting in Missouri, of course). Since a United States Marshal has the same functions as the state sheriff with respect to service of process and levying of writs, the garnishee would avail itself of the privilege under Section 525.070 (Mo. Rev. Stats., 1949), by making such payment to the Marshal. But logically beyond that procedural section, it is utterly unrealistic to suppose that an insurance company garnishee, subjected to garnishment after declining for cause to pay a judgment, would thereafter unjustly suffer by not being able to pay to a sheriff the amount garnished. It is obvious that the garnishee has chosen to contest, and not to pay. And it is completely fallacious to contend, as does petitioner, that a garnishee must be denied a Constitutional **right** of removal, further defined by an act of Congress, in order that it might at some indefinite future time be in position to assert a **privilege** under state law. The assertion of a Constitutional right of removal must take precedence over the preservation of a privilege (not to contest a garnishment) bestowed by the state law.

But even assuming that the opinion of the District Court in the Brucker case, supra, calls attention to some complications which might follow removal of a garnishment in aid of execution, would the complications be any greater or more insoluble than an instance in which garnishment or attachment had been used in aid of service? Obviously not, and in this regard we respectfully call to the atten-

tion of the Court Rule 64, Federal Rules of Civil Procedure, supra, which specifically provides for the application of state codes regarding garnishment in actions removed from a state court to a District Court.

b. Garnishment, as presented in the instant case, is clearly an "action" within the meaning of Section 1441 (a), 28 U. S. C. A.; Bradford v. Southern Ry. Co., 195 U. S. 243, 248, 25 S. C. 55, 49 L. Ed. 178, 180; Bouvier's L. D.

Petitioner contends that the instant proceeding is not removable because it is not "a separate and independent claim or cause of action" within the meaning of section 1441(c)[2] 28 U. S. C. A. American Fire Ins. Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702, is cited as authority for this position, but the opinion does not support petitioner's contention. In that case the plaintiff instituted action in the state court against two non-resident insurance companies and one resident individual. The first count stated a cause of action against one insurance company; the second count, against the other insurance company; and the third, against the individual defendant. However, all counts were based on a single transaction and a single set of facts. The gist of plaintiff's pleading was that liability lay among the three parties but it was uncertain which one was responsible. This Court held that the counts against the two insurance companies were not removable because they were not separate and independent claims or causes of action under section 1441 (c), 28 U. S. C. A. The same claim was being asserted in the same suit against a resident individual.

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[2] Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937.

The facts of that case and the point for decision therein clearly have no relation to the facts and issue of the instant case. The Finn case, supra, held only that section 1441 (c) created a new test for removal when one claim, theretofore considered removable, is joined with another non-removable claim. Section 1441 (c) clearly has no application to the issue in the case at bar, because in this case there is no joinder of claims against multiple defendants, some resident and some non-resident. Here one claim is asserted, against one non-resident defendant.

The instant case is not a situation where many issues are presented in a single lawsuit, some between residents of the same state, and others between residents of different states. No decision need be made here that one part or one issue in the case is or is not "separate and independent." There are but two opposite and adverse parties; the issues are entirely between them. Essentially this case is a suit on a contract by plaintiff against the alleged insurer; the issue is whether or not the contract has been abrogated.

A study of the legislative history of section 1441 (c) shows that this section of the removal statutes encompasses an entirely different situation than obtains in the instant matter. Section 1441 (c) was preceded by 28 U. S. C. A., section 71; the many cases decided thereunder, of which Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. Ed. 1122, is typical, make apparent the legislative intent of section 1441 (c).

In section 1441 (c) the decisive terms are "claim or cause of action" and "joined." Obviously these terms refer to a joinder of claims against more than one defendant, in one action. There is no joinder of claims in the instant case; the claim against garnishee is the only claim being presented against anyone. There can be no claim asserted against the judgment debtor; whatever

right or claim plaintiff might have had against him has been reduced to judgment and merged in the judgment. We respectfully submit that section 1441 (c) has no applicability to the instant case in any way.

III.

Petitioner states (Petn., p. 6) that the decision of the Court of Appeals for the Eighth Circuit is in conflict with two decisions of this Court and one opinion of the Court of Appeals for the Seventh Circuit. Analysis of the cited cases fails to support petitioner's contentions.

a. American Fire Insurance Company v. Finn has already been discussed and distinguished, supra, and its total dissimilarity noted.

First National Bank v. Turnbull, 16 Wall. 190, 21 L. Ed. 296, was a contest between a judgment creditor and a third party over the right to certain property taken under execution. No process was issued against the third party, and there was no garnishment against him—in fact, the third party voluntarily subjected himself to the jurisdiction of the state court although he was a stranger to the record. He entered the proceeding to make claim to property already in the constructive custody of the state court. No pleadings were filed to formulate the issues. The right of the judgment creditor was based solely and completely on the existence of the state court judgment, and did not depend on the interpretation of some other instrument such as an insurance policy. The issue to be tried was simply whether the execution process of the state court had been misapplied in seizing property which did not belong to the judgment debtor. Removal was not sought until after the state court had determined that the issues between the judgment creditor and the intervening third party would be tried by the court in a sum-

mary proceeding according to state statute. This was no garnishment **against** a third party—this was a claim **by** a third party to property already in the custody of the state officers. Under such circumstances, it was held that there was no right of removal in the third party. That case is manifestly different than the case at bar. Here the garnishee is brought in by service of process involuntarily, pleadings define the issues between plaintiff and garnishee, there is no property in custody (see infra), the rights asserted by plaintiff below depend upon the terms and interpretation of an insurance policy not in evidence in the action in which judgment was obtained, and the proceeding is a formal jury trial rather than summary hearing. The facts adequately distinguish the two situations. The opinion in Bank v. Turnbull, supra, was noted and reviewed by this Court in Krippendorf v. Hyde, 110 U. S. 276, 282, 4 S. Ct. 27, 28 L. Ed. 145, 148, wherein it was specifically noted that the Bank v. Turnbull case concerned possible misapplication of state court process, and the equities involved in the ownership of property in the custody of state officers. Obviously, therefore, the opinion in Bank v. Turnbull, supra, is not valid authority for denying the right of removal in the instant case, under the entirely different state of facts here presented.

A brief review of the line of authority cited as precedents in Bank v. Turnbull is enlightening as to the issues there involved. Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167, involved a motion for judgment against a United States Marshal. A judgment creditor had obtained his judgment in the (then) United States Circuit Court. Levying under an execution issued by that Court, the Marshal had accepted bank notes instead of demanding gold or silver. The banks which had issued the notes failed, and the judgment creditor moved for judgment against the Marshal under a statutory proceeding. This Court held that diversity of citizenship was not required to be shown

on the record in order to confer or maintain jurisdiction, because the proceeding was only a means to compel a court officer to stand responsible for proper performance of his duty with respect to property in his custody. Neither the facts nor the principles stated in the opinion in any way involve garnishment or removal, or any questions analogous thereto.

Another precedent cited in Bank v. Turnbull is Freeman v. Howe, 24 How. 450, 16 L. Ed. 749, 752. The opinion was rendered on writ of error from this Court to the Supreme Judicial Court of Massachusetts. Freeman, a United States Marshal, had attached certain railway cars in aid of service in a cause instituted in federal court. Howe and others, claiming to be mortgagees of the railway cars, brought a replevin action in the state court, and obtained judgment against Freeman, the Marshal. On the writ of error to the state court, this Court held that as to property in custody of the federal officer, the federal court had exclusive jurisdiction to determine its disposition. The repleviners, Howe and others, were in effect invited to seek relief by a bill in equity in the federal court, to redress any injustice resulting from the attachment. The case in no way involved removal of causes, and again illustrates that Bank v. Turnbull, supra, was decided on the basis that as to property within the custody of a court, that court has exclusive jurisdiction, whether the state or federal court first acquire such custody. None of these cases stands for, or even involves, the proposition that a garnishment in aid of execution cannot be removed by the garnishee. The true principle involved in the foregoing decisions is ancient in our law, and is recognized in Touchey v. New York Life Insurance Company, 314 U. S. 118, 134-135, 62 S. Ct. 139, 86 L. Ed. 100, 105, wherein this Court said:

> " " " However, a line of cases beginning with Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470, holds that the court, whether federal or state, which first

takes possession of a res withdraws the property from the reach of the other."

Bank v. Turnbull was subject to further comment by this Court in the same vein in Bondurant v. Watson, 103 U. S. 281, 26 L. Ed. 447, 450.

The rule expressed in these cases is based not only on a plain chronological priority, but also on the practical necessity of avoiding open conflict should the state sheriff try to dispossess the United States Marshal of property in his custody and vice versa: Touchey v. New York Life Insurance Company, supra. Such a situation is not created by the instant proceeding. Service on the garnishee is personal service and no property or "res" is in the possession of the state court! This is a principle firmly imbedded in Missouri law. In Calumet Paper Company v. Haskell Show Printing Company, 144 Mo. 331, 339, 340, 45 S. W. 1115, the Supreme Court of Missouri said:

"The question then is what lien or prior right, if any, plaintiff acquired by reason of the garnishment, the property not being attached, over all other creditors of the company? **It was ruled in McGarry v. Lewis Coal Co., supra, that no lien is created in favor of plaintiff on the property of the defendant in the hands of the garnishee by reason of the garnishment process. The court said: 'Ordinarily property is not deemed to be in the custody of the law until actually seized and reduced into possession by the officer.** Under the law applicable to attachments, it is the levy by the officer that creates the lien. If the plaintiff is not satisfied to look to the responsibility of the garnishee, he may apply to the court, or to the judge in vacation, and obtain an order upon the garnishee to deliver the property to the sheriff or into court, or the court may permit the garnishee to retain the property upon the execution of a bond to plaintiff with security" (Emphasis ours).

And in State ex rel. Rabiste v. Southern, Judge, 300 Mo. 417, 431, 254 S. W. 166, 169, 170, the Supreme Court of Missouri again stated:

> "No lien exists in favor of a plaintiff upon property of an attachment or execution defendant in the hands of the garnishee until such property comes into the hands of the sheriff. Until that time, such plaintiff must look to the personal responsibility of garnishee, unless he proceeds under Section 1853 to have such property delivered to the sheriff or to have security for its delivery exacted from garnishee as provided in said section (McGarry v. Lewis Coal Co., 93 Mo. 237; Calumet Paper Co. v. Haskell Show Printing Co., 141 Mo. 331, l. c. 341)."

This state of the law in Missouri was recognized by Mr. Justice Cardozo, of this honorable Court, in his dissenting opinion in Sanders v. Armour Fertilizer Works, 292 U. S. 190, 54 S. Ct. 677, 683, 684, 78 L. Ed. 1206, 1214 (cited by petitioner in another connection):

> "In the conflict of laws the difference may be important between realities and metaphors, between the organism and the germ. Sometimes the Illinois rule is accepted, **and there is said to be no lien**, or one that does no more than restrain the garnishee from making voluntary payments. See e. g. Commercial State Bank v. Pierce, 176 Iowa 722, 158 N. W. 481; **McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522**; Parker v. Farr, 2 Browne (Pa.) 331" (Emphasis ours).

Hence, the holding in First National Bank v. Turnbull, supra, and the line of cases therein cited as authority and precedent, have no bearing on the instant case and are not authority for petitioner's contention here. The decision of the Court of Appeals for the Eighth Circuit herein is not in conflict with any opinion or decision of this Court.

b. Nor is the instant opinion in conflict with any decision of any other Court of Appeals. In American Automobile Insurance Company v. Freundt (Seventh Circuit), 103 Fed. (2) 613, cited by petitioner, the issue of the removability of garnishments was not before the Court. That case was a declaratory judgment action brought in the District Court to determine coverage under a policy of insurance. The Court of Appeals for the Seventh Circuit held that the District Court was within the bounds of its discretion in refusing to take jurisdiction to hear the matter. The issue for decision was the breadth of the discretion vested in the District Court to hear or refuse to hear declaratory judgment suits, and whether or not in the particular instance the District Court had abused its discretion by refusing declaratory relief. The issue of removability of a garnishment was in no way involved, and hence could not be decided in that case. There is language in the opinion (l. c. 617) to the effect that a garnishment would not be removable under Illinois law; however, the law of Illinois is not there reviewed with respect to the institution of and procedure in garnishment actions, and since the point was not before the Court for decision the language is patently *obiter dictum*.

This Court has not undertaken to review on writ of certiorari any and all apparent conflicts between the Courts of Appeals. In Rice v. Sioux City Cemetery, 349 U. S. 70, 79, 75 S. Ct. 614, 99 L. Ed. 897, 904, this Court quotes with approval from the opinion of Mr. Chief Justice Taft in Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422, in which it is said:

"• • • It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of

the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

The same comment applies to the case at bar. There is no real conflict between any Courts of Appeals. A "conflict" necessarily requires that cases be **decided differently** under the facts which are at least similar. Since the issue of removability of garnishment actions was not before the Seventh Circuit in the American Automobile case, supra, and hence could not have been **decided**, there can be no real, and certainly no embarrassing conflict. The Eighth Circuit Court of Appeals has in two opinions, including the instant suit, decided issues properly before it. The Seventh Circuit Court of Appeals is still free to decide the issue when and if it is properly presented and raised for decision. The Seventh Circuit is not bound by its obiter dictum; as was said in Harriman v. Northern Securities Company, 197 U. S. 244, 291, 25 S. Ct. 493, 49 L. Ed. 739, 761:

> "Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.
>
> "This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. Cohen v. Virginia, 6 Wheat. 399, 5 L. Ed. 290; Carroll v. Carroll, 16 How. 279, 14 L. Ed. 938."

To the same effect is the opinion in United States v. County Court of Clark County, 96 U. S. 211, 217, 218, 24 L. Ed. 628, 630. These opinions but express an axiom of the law: *obiter dicta* neither decide any issue, nor bind the court or any future litigant. Therefore, there is no "real" or "embarrassing" conflict between the *obiter* in the Ameri-

can Automobile case, supra, Seventh Circuit, and the instant opinion in the Eighth Circuit; and this Honorable Court should not issue its writ to review a **decision** in the light of an *obiter dictum*.

There are no other opinions even alleged to be in conflict with the opinion of the Eighth Circuit Court of Appeals in the instant case.

IV.

There are but two appellate court opinions in the entire federal judicial system directly concerned with and deciding the removability of garnishments in aid of execution. One is Stoll v. Hawkeye Casualty Company, 185 F. (2) 96; the other is the opinion in the case now at bar. The two opinions are consistent. Both are by the United States Court of Appeals for the Eighth Circuit. There are no other opinions in any case wherein the issue has been before either this Honorable Court or any other Court of Appeals for decision, with which the instant opinion below could conflict.

Within the meaning of the Constitution of the United States, Article III, establishing the jurisdiction of the federal courts, and the acts of Congress pursuant thereto, and within the meaning of the laws and applicable decisions of the Supreme Court of Missouri, the garnishment proceeding involved was an independent action between plaintiff (petitioner) and garnishee (respondent), and did not involve property in the custody of the state court so as to prevent the District Court from accepting jurisdiction.

The very dearth of opinions illustrates forcibly that the issue is not one of widespread general interest, or affecting the public in general so as to either require or justify the issuance of this Court's writ of certiorari. The issue is

one which arises most infrequently and on the rare occasions when it does, it is a matter of only private interest to the litigants involved.

For the reasons stated, we respectfully pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN S. MARSALEK,
330 Pierce Building,
112 North Fourth Street,
St. Louis 2, Missouri,
GArfield 1-5364,
Attorney for Garnishee-Respondent.